

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

CARRIE L. SMITH,

No. C-04-00558 SBA (EDL)

Plaintiff,

v.

DIXIE SCHOOL DISTRICT,

Defendant.

**ORDER DENYING WITHOUT
PREJUDICE DEFENDANT’S MOTION
FOR DISCOVERY REFEREE;
GRANTING DEFENDANT’S MOTION
TO COMPEL *IN CAMERA* REVIEW OF
PLAINTIFF’S JOURNAL; GRANTING IN
PART AND DEFERRING IN PART
DEFENDANT’S MOTION FOR FEES
AND COSTS**

In this employment discrimination case, Plaintiff, a physical education teacher at Miller Creek School in the Dixie School District from August 2001 through June 2003, claims that she was subjected to discrimination and was essentially forced to resign. On March 10, 2005, Defendant filed two discovery motions and a motion for fees and costs. On May 6, 2005, these matters were referred to this Court. Because the motions are appropriate for decision without oral argument, the Court vacated the May 24, 2005 hearing.

Motion for Discovery Referee

Defendant seeks an Order appointing a discovery referee or special master to monitor the remainder of Plaintiff’s deposition based on Plaintiff’s counsel’s behavior during Plaintiff’s depositions on November 15, 2004 and February 4, 2005. Under limited circumstances, Federal Rule of Civil Procedure 53 permits appointment of a special master to, *inter alia*, “address pretrial and post-trial matters that cannot be addressed effectively and timely by an available district judge or magistrate judge of the district.” See Fed. R. Civ. Proc. 53, Advisory Committee notes, 2003 amendment (recommending that pretrial masters be appointed “only when the need is clear.”); 9A

1 Wright & Miller, Federal Practice & Procedure, § 2601 at 405 (2005 Supp.).

2 In this case, the Court is deeply troubled by Plaintiff's counsel's extreme misconduct at the
3 depositions. In stark contravention of the Federal Rules of Civil Procedure and of basic professional
4 standards, Plaintiff's counsel frequently interrupted the first deposition with inappropriate speaking
5 objections, needless commentary and blatant witness coaching. See Fed. R. Civ. Proc. 30(d)(1)
6 ("Any objection during a deposition must be stated concisely and in a non-argumentative and non-
7 suggestive manner."). The instances of Plaintiff's counsel's improper conduct are extensive; the
8 following examples are merely a sample.

9 Plaintiff's counsel improperly interjected statements such as "If you know" on numerous
10 occasions before Plaintiff could even answer pending questions. See, e.g., Nov. 15, 2004 Transcript
11 at 22:8-10 (Q: "Did they hire you as a first-year probationary teacher or on some other status?" Ms.
12 Andelin: "If you know." Witness: "First-year probationary."); 24:10-15 (Q: "The teacher training
13 programs you described or mentioned a minute ago, did they have something to do with things you
14 had to do to get your credential?" Ms. Andelin: "If you know." Witness: "Not necessarily. They
15 weren't directly related."); 26:16-20 (Q: "Were you hired to replace another teacher who had left, or
16 were they expanding the PE department?" Ms. Andelin: "If you know." Witness: "Hired to replace
17 a teacher that moved to vice principal."); 66:1-5 (Q: "So you had an office inside the girls' locker
18 room, and there were similar PE offices inside the boys' locker room?" Ms. Andelin: "If you
19 know," Witness: "Yes."); 105:8-16 (Q: "Do you recall any occasions when you did receive a radio
20 communication in the morning from Scott or from Dylan, a two-way radio communication, saying
21 that you can't use the gymnasium, you're going to have to teach your activity outside because the
22 gymnasium was unusable?" Ms. Andelin: "If you remember one, tell him about what you
23 remember." Witness: "I don't remember specifically.").

24 Further, Plaintiff's counsel improperly coached her client. See, e.g., Nov. 15, 2004
25 Transcript at 56:13-23 (Q: "Getting back to the subject that we were on before we took our break,
26 are there in-service days at Dixie district which a teacher shows up for and is paid for but it's
27 actually before the classroom teaching starts?" Ms. Andelin: "Do you understand the question?"
28 Witness: "Yes." Ms. Andelin: "In-service days?" Witness: "Not before the teaching actually starts,

no. Not early in the morning, if that's what you're asking."); 79:11-21 (Q: "Nonetheless, did you ever see anything in writing from the Miller Creek School or from that district that said, 'Teachers are supposed to create lesson plans,' or words to that effect?" Witness: "Yes." Q: "What was that in?" A: "Personnel handbook." Ms. Andelin: "If you know, Don't guess. Do you know?" Witness: "No. I don't know."); Feb. 4, 2005 Transcript at 273:19-25 (Q: "This journal, does it cover periods of time before and after Miller Creek or just your experiences at Miller Creek?" A: "Just my experience at Miller Creek." Ms. Andelin: "For a particular period of time." A: "For -- yes, for a particular period of time."); 287:6-9 (A: "My first entry that mentions an attorney is April 23rd." Ms. Andelin: "Well, I think there's one on April 8, if you want to look at it again."); 420-423:1 (Q: "Ma'am, did Mr. Johnson ever use the words 'summarily terminated' in his discussion with you?" A: "I don't remember his jargon." A: "Do you remember any administrator --" Ms. Andelin: "Do you want to see what you wrote at the time?"). In another blatant example of witness coaching, counsel succeeded in having Plaintiff change her testimony. See Nov. 15, 2004 Transcript at 228:1-17 (Q: "How did you get along with Dwayne, the other one in the PE department, your second year?" A: "Dylan?" Q: "Dylan. I'm sorry." A: "I mean, we worked together." Q: "No offensive interactions?" A: "No, no offensive." Ms. Andelin: "You should define what you mean by offensive interactions." Q: "Well, let the witness define it. If she thought it was offensive, I want to hear about it." A: "Nothing offensive that I recall." Ms. Andelin: "Did they include you in the meetings?" A: "Well, besides not including me in the meetings in the mornings in the boys' locker room.").

Plaintiff's counsel also made unnecessary editorial comments in response to some questions. See, e.g., Nov. 15, 2004 Transcript at 172:10-14 (Q: "Do you have a copy of Scott's letter that you referred to?" A: "No. I was never given a copy." Ms. Andelin: "And surprise, surprise, it's not in her personnel file. What a surprise."); Feb. 4, 2005 Transcript at 399:19-23 (Q: "Do you know whether in doing so, whether Dylan was motivated by concerns regarding student safety?" A: "I don't know what Dylan's motives were." Ms. Andelin: "We do know what Mr. Zellers said in his deposition, however.").

On several occasions, Plaintiff's counsel consulted with her client while the deposition was

1 on the record, and in some instances, while a question was pending. See, e.g., Nov. 15, 2004
2 Transcript at 82:24-83:2 (Q: “The substitute didn’t have one, and that’s how the administration
3 found out?” A: “Yes.” (Attorney-client sotto voce discussion).); 112:24-113:2 (Q: “How many
4 calls like that where the subject was a Friday run that was being changed do you actually remember
5 receiving?” (Attorney-client sotto voce discussion).). It is improper for an attorney to consult with
6 her client during the deposition unless there is a question of privilege; consultations while a question
7 is pending are particularly inappropriate. See Armstrong v. Hussman Corp., 163 F.R.D. 299, 303
8 (E.D. Miss. 1995) (“Attorneys are also prohibited from acting as an intermediary during their
9 client’s deposition – from interpreting opposing counsel’s questions; having private conferences
10 with their client during a deposition; and conferring with their client about a document presented by
11 the deposing attorney.”).

12 In addition, Plaintiff’s counsel was unnecessarily argumentative with defense counsel. See,
13 e.g., Nov. 15, 2004 Transcript at 144:25-145:4 (Q: “Can you give me any other context which would
14 explain a statement like that from Scott?” A: “No.” Ms. Andelin: “Why don’t you ask Scott Zellers,
15 She doesn’t know why he made the statement to her.”). Many times, Plaintiff’s counsel improperly
16 interjected statements not in the nature of objections or clarifications in response to defense
17 counsel’s questions before Plaintiff has a chance to answer. See, e.g., Nov. 15, 2004 Transcript at
18 27:18-21 (Q: “You can’t recall whether it was the principal or vice principal?” Ms. Andelin: “I’m
19 sure it will say on her records.”); 138:13-14 (Q: “Did you bring that [diary]?” Ms. Andelin: “Why
20 would she?”). In a particularly disturbing exchange, it appears from the videotaped deposition that
21 Ms. Andelin coached Plaintiff by pointing to a portion of an exhibit. See Feb. 4, 2005 Transcript at
22 408:5-21.

23 After reviewing the transcript of the November 2004 deposition, and the transcript and
24 videotape of the February 2005 deposition, the Court concludes that Plaintiff’s counsel engaged in
25 unprofessional and unacceptable behavior that unnecessarily and improperly prolonged Plaintiff’s
26 deposition. Contrary to Federal Rule of Civil Procedure 30(d)(1), her interruptions were constant,
27 often lengthy and at times argumentative. Plaintiff’s counsel’s behavior is some of the most
28 egregious this Court has seen and may well justify appointing a special master. However, the Court

1 will give Plaintiff's counsel one more chance to conform her conduct to professional norms now that
2 she has the benefit of the Court's opinion regarding her misconduct. The Court expects that counsel
3 will adjust her behavior accordingly. Therefore, the Court declines to appoint a discovery referee at
4 this time. If, however, Plaintiff's counsel continues to engage in any conduct that further delays or
5 disrupts Plaintiff's deposition, the Court will appoint a referee at Plaintiff's expense. Both counsel
6 are reminded that if a dispute arises during Plaintiff's continued deposition, Civil Local Rule 37-1(b)
7 provides a mechanism for obtaining a telephonic conference with the Court to resolve the dispute.
8 Defendant's Motion for a Discovery Referee is denied without prejudice.

9 **Motion for *In Camera* Review**

10 Prior to the February 4, 2005 deposition, Plaintiff produced a copy of her personal journal for
11 the period February 27, 2003 through May 26, 2003, the last few months of her employment with
12 the Dixie School District. See Smith Decl. In Support of Opposition to Defendant's Motion for *In*
13 *Camera* Review Exh. 1. The journal contains Plaintiff's day-to-day observations and experiences at
14 the school, and some portions of the journal are redacted based on attorney-client privilege.
15 Defendant's motion for an *in camera* review is directed at discovering these redacted portions.

16 If the redacted portions of the journal reflect memorializations of communications between
17 Plaintiff and her counsel, they are protected by the attorney-client privilege. See United States v.
18 Martin, 278 F.3d 988, 999 (9th Cir. 2002) (describing the elements of the attorney-client privilege).
19 According to Defendant, however, Plaintiff's deposition testimony indicates that the redacted
20 portions of the journal may not be mere memorializations. Plaintiff testified that she wrote in this
21 journal while she was working at the middle school and that it only covers her experience at the
22 school for the period between February 27 and May 26, 2003. See Shupe Decl. In Support of *In*
23 *Camera* Review Exh. C at 273:17-22. She bought the journal for the sole purpose of recording
24 events at the school. See id. at 275:11-13. She testified that the journal was for her personal use and
25 that the entire journal was just a contemporaneous recordation of events that happened to her at the
26 school. See id. at 277:16-24. Importantly, Plaintiff testified that during the period of time reflected
27 in the journal, she was not represented by an attorney with respect to any matter related to the
28 middle school. See id. at 285:17-20. Her attorney then objected and said, "Oh, yes, you were." See

1 id. at 285:23. Plaintiff then testified that she first had an attorney who represented her in connection
2 with this lawsuit as of April 8, 2003. See id. at 287:1-288:4.

3 In opposition to this motion, Plaintiff stated in her declaration that she consulted a lawyer on
4 April 8, 2003 and that she wrote in her journal on several occasions about her communication with
5 Ms. Andelin. See Smith Decl. In Support of Opposition to Defendant's Motion for *In Camera*
6 Review ¶ 9. She stated that the redacted lines "relate our conversations, my understanding of Ms.
7 Andelin's legal advice and legal strategy as well as my motive in seeking representation and the
8 specific nature of the services she provided to me." See id. ¶ 10. Ms. Andelin's declaration is in
9 accord. See Andelin Decl. In Support of Opposition to Defendant's Motion for *In Camera* Review
10 ¶¶ 3-4.

11 Plaintiff's deposition testimony contradicts itself and contradicts her later-filed declaration
12 on the issue of whether she was represented by counsel during the period of time contained in the
13 journal. If Plaintiff was not represented by counsel during that time, redactions based on the
14 attorney-client privilege are not justifiable. Defendant has made a showing, unrebutted by Plaintiff
15 who does not address the inconsistency in her testimony, that the information may not be protected
16 by the privilege. Other than an *in camera* review, there is no way to determine whether the portions
17 are discoverable or whether they are privileged as claimed by Plaintiff and her counsel. See United
18 States v. Zolin, 491 U.S. 554, 572 (1989) (holding that the party seeking an *in camera* review must
19 make an evidentiary showing that there is a legitimate issue as to the application of the privilege).
20 Although *in camera* review is generally disfavored, the Court grants Defendant's Motion for *In*
21 *Camera* Review of the redacted portions of Plaintiff's journal. Plaintiff shall lodge an unredacted
22 copy of the journal directly with chambers no later than June 6, 2005.

23 **Motion for Attorneys' Fees and Costs**

24 Defendant seeks an award of fees and costs pursuant to Federal Rule of Civil Procedure
25 37(a)(4) relating to the two discovery motions. Although the Court denied without prejudice
26 Defendant's Motion for Discovery Referee, the conduct necessitating the motion was so outrageous
27 that the Court awards Defendant its fees under the Court's inherent power. See Roadway Express v.
28 Piper, 447 U.S. 752, 766 (1980) (holding that courts possess inherent power to impose sanctions for

1 “willful abuse of judicial processes”). Defense counsel stated that he spent six hours preparing the
2 motion and estimated that he would spend three hours preparing the reply brief, and that his hourly
3 rate is \$145.00. See Shupe Decl. In Support of Motion for Fees at ¶¶ 4,5. The amount of time
4 expended and the billing rate is reasonable given the work performed.

5 Defendant incurred the expense of videotaping Plaintiff’s February 2005 deposition in an
6 effort to curtail Plaintiff’s counsel’s misconduct. Therefore, Defendant is also entitled to recovery
7 of reasonable costs paid for the videotape. Defendant has not submitted any evidence of this
8 amount, and shall do so no later than June 6, 2005.

9 Therefore, Defendant’s Motion for Fees relating to the Motion for Discovery Referee is
10 granted in the amount of \$1,305.00 for attorney’s fees. The Court will issue a separate order
11 awarding reasonable costs for the videotape.

12 The Court defers decision on Defendant’s Motion for Fees relating to the Motion for *In*
13 *Camera* Review.

14 **IT IS SO ORDERED.**

15 Dated: May 27, 2005



ELIZABETH D. LAPORTE
United States Magistrate Judge